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In the Supreme Court of the United States

OCTOBER TERM, 1985

NORMAN O. AAMODT AND MAJORIE M. AAMODT,
PETITIONERS
v.
UNITED STATES NUCLEAR REGULATORY
COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in affirming the Nuclear Regulatory Commission's refusal to reopen the closed hearing record of the Three Mile Island, Unit One restart proceeding and the Commission's authorization for the unit to restart.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 6A-73A) is reported at 771 F.2d 720. The memorandum and order of the Nuclear Regulatory Commission (Pet. App. 77A-270A) is reported at 21 N.R.C. 1118.

JURISDICTION

The judgment of the court of appeals (Pet. App. 4A-5A) was entered on August 27, 1985. A petition for rehearing by the panel and for rehearing en banc was denied by the court of appeals on September 19, 1985 (Pet. App. 271A-272A). The petition for a writ of certiorari was filed on December 18, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Following the March 28, 1979, accident at Three Mile Island, Unit Two (TMI-2), the Nuclear Regulatory Commission (NRC or Commission) directed that the undamaged sister unit, Three Mile Island, Unit One (TMI-1), remain in a shutdown condition pending the completion of an adjudicatory hearing to be conducted by an NRC Atomic Safety and Licensing Board (Licensing Board) on whether the facility should be permitted to restart. The Commission made the shutdown orders immediately effective and provided that the Commission itself would decide, after the Licensing Board issued its decision, whether to lift the immediate effectiveness of the orders prior to completion of the NRC's review of the Licensing Board's decision. See 10 N.R.C. 141 (1979).

The Commission then held what were probably the most comprehensive adjudicatory proceedings that it has ever conducted. They lasted for nearly six years, generating transcripts exceeding 33,000 pages (not including the prefiled testimony of nearly 200 witnesses and hundreds of exhibits) and an administrative record far exceeding 100,000 pages.

On May 29, 1985, the Commission issued a memorandum and order in which it determined that the public health and safety concerns which had led the Commission to make the shutdown orders immediately effective had been satisfactorily resolved. The Commission accordingly lifted the immediate effectiveness of the shutdown orders and authorized the restart of TMI-1. 21 N.R.C. 1118; Pet. App. 77A-270A.

After the Commission authorized restart of TMI-1, four participants in the restart proceeding—the Commonwealth of Pennsylvania, the Union of Concerned Scientists, Three Mile Island Alert, Inc. (TMIA), and petitioners—

filed petitions for review with the United States Court of Appeals for the Third Circuit. Accompanying those petitions were motions requesting an emergency stay barring restart until the court of appeals had acted on the appeals. On June 7, 1985, the court stayed the Commission's restart order because of what it termed the "pervasive nature of the public interest involved" (Pet. App. 1A-3A).

Following expedited briefing and argument, the court of appeals, in a thorough opinion issued on August 27, 1985 (Pet. App. 6A-73A), affirmed the Commission's May 29, 1985, restart decision, finding that the Commission "has exercised its authority reasonably and in accordance with law" (*id.* at 51A). The next day the NRC announced that it would be providing GPU Nuclear Corporation, the licensee for TMI-1, with the necessary paperwork to restart the unit.

All four petitioners below again sought emergency relief from the court of appeals. In response, the Third Circuit, on August 29, 1985, issued an order extending the June 7, 1985, stay until it had acted upon any petitions for rehearing. On September 19, 1985, the court denied the petitions for rehearing by a 10-2 vote (Pet. App. 271A-272A) and issued an order stating that its June 7 stay would dissolve on September 25, 1985, unless this Court or a Justice thereof provided otherwise (*id.* at 273A-274A).

TMIA, supported by the other three petitioners, then sought a stay from Justice Brennan. Justice Brennan referred the stay request to the full Court and, on October 2, 1985, the Court by an 8-1 vote denied it.

Only the Aamodts have filed a petition seeking a writ of certiorari.

2. The petition to this Court arises principally out of the Commission's denial of petitioners' request to reopen the closed record in the TMI-1 restart proceeding in light of a

health study they made. Prior to the issuance of the Commission's May 29, 1985, restart decision, the Commission received numerous requests that it reopen the adjudicatory record (closed in this regard in December 1981) of the restart proceeding to hear further evidence. Among the requests rejected was one from petitioners that the Commission hear evidence relating to an alleged increase in cancer among residents of the Harrisburg, Pennsylvania, area following and assertedly resulting from the TMI-2 accident. 21 N.R.C. 1111.

Petitioners initially raised the issue in June 1984 by filing a motion requesting the Commission to conduct health studies prior to authorizing restart. They alleged that releases of airborne radioactive materials from the March 28, 1979, accident at TMI-2 were substantially greater than previously acknowledged and that these releases led to an unexpectedly high level of cancer in local residents. Petitioners based this allegation on door-to-door interviews, conducted by Majorie Aamodt and others, of residents of two areas near the TMI reactors.

The Commission rejected the health study request on December 13, 1984. 20 N.R.C. 1573. The Commission noted that, in the aftermath of the TMI-2 accident, allegations of adverse health effects had been raised by numerous groups and that these allegations had been investigated by the NRC, independent investigatory bodies, and the Commonwealth of Pennsylvania, and found to be without merit. The Commission further noted that the Centers for Disease Control, which had reviewed petitioners' survey at the Commission's request, had concluded that it lacked convincing evidence of increased incidence of cancer related to the TMI-2 accident in TMI-1 area residents. *Id.* at 1574.

In January 1985, petitioners asked the Commission to reconsider the decision not to sponsor additional studies, and also requested it to reopen the record of the restart

proceeding to allow litigation over the health effects issues raised by their survey. The Commission denied that request on May 16, 1985, fully explaining why its standards for reopening the record had not been satisfied. 21 N.R.C. 1111.[1] The Commission found that petitioners' informal survey was "fragmentary and anecdotal." The Commission pointed out, for example, that the study did not report when the cancers were diagnosed relative to the TMI-2 accident and had not shown that the cancers resulted from the TMI-2 accident. When the cancers arose or were diagnosed is of critical significance, because those arising prior to the accident obviously cannot be attributed to it, and even cancers first diagnosed after the accident may have originated earlier because of the long latency period that generally precedes symptoms of the disease. *Id.* at 1114.[2]

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[1]The Commission explained that usually it reopens a closed record only if a petitioner timely presents information on significant safety or environmental issues that might have led the Commission to reach a different result had it been considered. 21 N.R.C. at 1113. The courts have endorsed these criteria. See page 8 note 4 and accompanying text, *infra*.

[2]Subsequent to the Commission's order and the court of appeals' decision, the Commonwealth of Pennsylvania issued a study of cancer rates around the Harrisburg area which thoroughly analyzed petitioners' claims. The Commonwealth found that there is no present evidence of an increased risk of developing cancer by local residents living near the TMI facilities. The Commonwealth found numerous serious flaws in petitioners' study. For example, it found that some of the cancers cited had been diagnosed prior to 1979 and, therefore, could not be attributed to the TMI-2 accident; moreover, the objectivity and sampling techniques used were criticized. Pennsylvania Department of Health, *Cancer Mortality and Morbidity (Incidence) Around TMI* (Sept. 1985). We are lodging a copy of that study with the Clerk of this Court. Other parties in this case (including petitioners, in an exhibit to their response to this Court in support of a stay) have discussed it (see also Metropolitan Edison Co. Br. in Opp. 11); it was, however, issued after the record in the present case was closed.

The court of appeals dealt with the Commission's treatment of the petitioners' health effects allegations in some detail (Pet. App. 43A-46A). It found that the Commission was not arbitrary or capricious in refusing to reopen the record to require further litigation over these allegations. The court pointed out that the Commission had found serious methodological flaws in petitioners' study and that the NRC was not required to adopt petitioners' views of the statistical significance of the cancer cases they discovered or of the latency period between exposure to radiation and the occurrence of cancer. The court further noted that the Commission's use of scientific studies to evaluate petitioners' claims is the kind of scientific determination to which " 'a reviewing court must generally be at its most deferential.' " *Id.* at 46A (quoting *Baltimore Gas & Electric Co.* v. *Natural Resources Defense Council, Inc.*, 462 U.S. 87, 103 (1983)).

ARGUMENT

The decision of the court of appeals in this unique and factbound dispute is correct and conflicts with no decision of this Court or any other court of appeals. Further review is not warranted.[3]

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[3]Most of petitioners' contentions may be rejected quickly.

Petitioners frequently mention, but never discuss in any manner, the Commission's refusal to reopen the closed restart record to allow litigation over the so-called "Hartman allegations." Those allegations of leak rate falsifications at TMI-*2* more than six years before the TMI-1 restart decision were exhaustively examined by the NRC and found not to meet the agency's established criteria for reopening the record. In particular, they did not raise a significant safety issue for the operation of TMI-1 because the facility would be run by different operators under different and far stricter oversight. 21 N.R.C. 282 (1985). The Third Circuit carefully scrutinized and properly upheld the Commission's treatment of these allegations (Pet. App. 34A-40A). That decision, never specifically attacked by petitioners, is correct. Not only is the Commission's determination entitled to great deference, it is, in any

1. Petitioners' primary claim (Pet. 7-13) relates to the Commission's refusal, prior to authorizing restart, to reopen the closed adjudicatory record to permit litigation of health effects issues in light of their health study. Petitioners' health theories are, however, simply inconsistent with the prevailing views of the federal government experts and the general scientific community. The record demonstrates (see pages 3-6, *supra*) that the Commission took a hard look at petitioners' health effects claims, evaluating them with the aid of expert opinion from the Centers for Disease Control, before rejecting petitioners' request for further studies and proceedings. The court of appeals carefully considered (Pet. App. 45A-46A) the Commission's criteria

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event, necessarily factbound and nonrecurring. Petitioners simply disagree with the Commission's fact-finding, and this dispute does not merit this Court's review.

Next, petitioners contend (Pet. 14-17) that before authorizing restart the Commission should have prepared an environmental impact statement (EIS) on TMI-1 restart which addressed the health effects issues arising from their study. Petitioners did not object below to the NRC's decision that an EIS was unnecessary, and no party raised the issue before the court of appeals. This Court has made clear on numerous occasions that a party cannot raise substantive claims before this Court that were not before the lower courts. See, *e.g.*, *Tacon* v. *Arizona*, 410 U.S. 351, 352 (1973). In any event, petitioners' study does not trigger a need for a new EIS, because the NRC has determined that their study is unreliable. See pages 3-6, *supra*; 10 C.F.R. 51.92; 40 C.F.R. 1502.9(c)(1).

Petitioners also contend (Pet. 20-22) that, while the Commission's expert determinations are entitled to deference as a general matter, here they are not because these determinations were made inexpertly. This assumes the conclusion and would leave nothing of the general principle of judicial deference to the Commission's scientific expertise.

Finally, the accusations at Pet. 22-23 appear to be derivative of petitioners' other contentions.

for reopening a record and concluded that the Commission's refusal to do so here was neither arbitrary nor capricious.[4] The court of appeals' deference to the Commission's scientific determinations (*ibid.*) followed this Court's guidance in *Baltimore Gas & Electric Co.* v. *Natural Resources Defense Council, Inc.*, 462 U.S. 87 (1983). In sum, the health effects claims raised by petitioners do not present legal issues warranting review by this Court.

2. Petitioners also contend (Pet. 17-20) that further hearings are required on the 155 conditions imposed on licensee GPU Nuclear Corporation by the NRC as a condition of TMI-1 restart, and that the court of appeals erred in holding (Pet. App. 25A-29A) that these conditions were not license amendments subject to the hearing requirements of Section 189(a) of the Atomic Energy Act, 42 U.S.C. 2239(a). The court of appeals' finding in this regard is correct, and we rely on it here.[5] The Commission is still considering whether to amend the license, but no such amendment has yet taken place. As we pointed out below (U.S.C.A. Br. 72), orders like this one which do not enlarge a licensee's authority need not take the form of license amendments. See *In re Southern California Edison Co.*, 21 N.R.C. 1569, 1574-1575 (1985), appeal docketed, No. 85-7003 (9th Cir. Jan. 3, 1985). In any event, the legal issues relating to whether the conditions here are license amendments or not are unique to this concededly unusual proceeding and are not likely to arise again. They do not merit review by this Court.

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[4]These criteria also received judicial sanction in *San Luis Obispo Mothers for Peace* v. *NRC*, 751 F.2d 1287, 1317-1318 (D.C. Cir. 1984). (On May 1, 1985, the District of Columbia Circuit, en banc, vacated part of this decision and granted rehearing en banc on that part. 760 F.2d 1320. That aspect is, however, inapplicable for the citations to the case in this brief.)

[5]Cf. *San Luis Obispo Mothers for Peace* v. *NRC*, 751 F.2d at 1314. Petitioners concede in principle that some new conditions would not require a hearing (Pet. 20).

Even if the new conditions were license amendments, moreover, petitioners would not be entitled to an adjudicatory hearing. All but two of the 155 new conditions were in fact imposed after and as a direct result of a full adjudicatory hearing in which petitioners participated. There is no requirement under the Atomic Energy Act or the Administrative Procedure Act that a second hearing be held on the adequacy of conditions imposed as a result of an earlier hearing. The two remaining conditions[6] were imposed to confirm *additional* safety commitments made by the licensee and did not confer any authority on the licensee beyond that already granted in its original license. Petitioners do not argue that these — or any of the other — conditions should not have been imposed. Rather, they argue that a hearing should be held to determine whether *further* conditions are required. But even if the NRC decided now to reopen the record regarding the two conditions which did not result from the earlier hearing, it would not have to allow petitioners to intervene on whether safety measures beyond those being imposed by the NRC are required. See *Bellotti* v. *NRC*, 725 F.2d 1380 (D.C. Cir. 1983).[7] See also *San Luis Obispo Mothers for Peace* v. *NRC*, 751 F.2d 1287, 1312-1314 (D.C. Cir. 1984). In any event, because

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[6]The first of those conditions precluded the licensee from employing anyone likely to have been involved in TMI-2 leak rate data falsifications in operational or responsible management positions at TMI-1. The second required the licensee to maintain its expanded Board of Directors and its Nuclear Safety and Compliance Committee. 21 N.R.C. 282, 341-342 (1985).

[7]Thus, petitioners' assertion (Pet. 19-20) that the Third Circuit's decision is inconsistent with *Sholly* v. *NRC*, 651 F.2d 780 (D.C. Cir. 1980), vacated on other grounds, 459 U.S. 1194 (1983), is misplaced. *Sholly* held that, where all parties agreed that there had been a license amendment, granting a licensee approval to do something it otherwise could not do required a hearing. But here no amendment is conceded and the NRC is adding restrictions, not removing them. *Sholly* is therefore inapposite.

petitioners raised issues covered by the two license conditions after the hearing record had been closed, the Commission properly looked to its criteria for reopening a record and found that they had not been satisfied. Section 189(a) of the Atomic Energy Act permits the NRC to establish reasonable procedural limitations as prerequisites to the right to a hearing on any issue. See *BPI* v. *Atomic Energy Commission*, 502 F.2d 424 (D.C. Cir. 1974). These reasonable limitations include the imposition of a high threshold evidentiary showing as a prerequisite to reopening the record. See Pet. App. 45A-46A; *San Luis Obispo Mothers for Peace* v. *NRC*, 751 F.2d at 1317-1318.

3. This Court made clear in *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519, 557-558 (1978), that Congress intended that nuclear power plants could be licensed upon satisfaction of NRC requirements and that the courts are to play only a limited role in reviewing NRC licensing decisions. In essence, Congress has decided that the possibility of an accident at a nuclear power plant licensed in accordance with NRC requirements is so slight that it is an acceptable risk, necessary to ensure a diversified, plentiful, and affordable energy supply. In this case the Commission has conducted a comprehensive adjudicatory and technical review. As a result, it has found that operation of TMI-1 presents no undue risk to public health and safety. The court of appeals correctly concluded that such a determination, squarely within the Commission's technical expertise, is entitled to great deference. *Baltimore Gas & Electric Co.* v. *Natural Resources Defense Council, Inc.*, 462 U.S. at 97, 103; *Carstens* v. *NRC*, 742 F.2d 1546, 1551 (D.C. Cir. 1984), cert. denied, No. 84-1442 (June 3, 1985).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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